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FOREIGN SERVICE DESPATCH

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406
DESP. NO.

762A.5/9-1459

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FROM : Amembassy, BONN

TO : THE DEPARTMENT OF STATE, WASHINGTON.

REF : Embassy's G-42, July 24, 1959.

September 14, 1959

DATE

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SERIES A

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SUBJECT: Alert Measures: Emergency Powers of the Federal Government.

The three Embassies have now received from Dr. Ritter, for their comments, drafts of the following documents:

1. Proclamation of the three Ambassadors;
2. Proclamation of the President of the Federal Republic announcing a State of Emergency;
3. Decree by the President of the Federal Republic authorizing Federal and Land authorities to take certain specified emergency measures.

English translations of these documents are attached. Except for minor editorial changes, they correspond to the drafts which were attached to the letter from Mr. Raymond L. Thurston to Mr. Tyler of August 27, 1959, a copy of which was transmitted to Mr. Hillenbrand, GER.

The Embassy has been informed that these drafts have resulted from combined efforts by various interested Federal Ministries (Defense, Justice, Interior, Foreign Affairs) and constitute in all major aspects the latest position of the Federal Government as regards an interim solution in the field of emergency legislation. According to Dr. Ritter, the Defense Council of the Federal Republic will consider the drafts at a meeting on September 22. It is not believed, however, that the basic concepts of the German proposals will be changed as a result of this meeting.

The salient feature of these proposals is the strict separation between Allied and German pronouncements to be issued in the event of a national emergency. The three Ambassadors, acting in the exercise of the rights reserved by the Three Powers under paragraph 2 of Article 5 of the Convention on Relations, will state in their Proclamation that the security of the forces for which they are responsible is threatened, and that they will make use of their reserved rights only to the extent that German authorities are prevented from taking effective measures to protect the security of the stationed forces. The State of Emergency, on the other hand, will be proclaimed by the Federal President. In an accompanying decree the President, acting in the exercise of extraordinary powers inherent in

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a government to meet an external threat to its existence, will authorize Federal and Land authorities to take specified measures, such as issuing ordinances having the force of law and including those suspending temporarily certain constitutional rights.

By these proposals the Germans have rejected the original Allied suggestion that the State of Emergency be proclaimed by the three Ambassadors and that the German authorities act as agents of the Three Powers in the exercise of the rights reserved by them under paragraph 2 of Article 5 of the Convention on Relations. The drafts also eliminate a British alternative proposed by General Gale that the Federal Chancellor be associated with the three Ambassadors in the Proclamation of a State of Emergency otherwise drafted substantially along the lines of the original Allied proposal. The Germans, we are told, have found the Allied proposals unacceptable on political and legal grounds. They consider that German authorities acting as agents of the Three Powers would conjure up in the eyes of the German people the spectacle of a return to an occupation status. They therefore insist that emergency measures which German authorities will have to take should have their origin in German sovereign rights. In the absence of legislation conferring emergency powers on the Federal Government, they hold that the executive branch, basing itself on the right inherent in a government to preserve its existence when threatened from abroad, has the power to deal with such emergency. General Gale's proposal seemed to them objectionable in that it associated the Federal Chancellor in the exercise of rights reserved by the Three Powers and, therefore, incapable of being exercised by anyone else than the Three Powers.

In commenting on these basic concepts of the German proposals, the Embassy appreciates the political and legal reasons advanced by the Germans for rejecting the various Allied proposals. The Embassy has always assumed that the Three Powers do not wish to force upon the Germans a solution which they find objectionable. In an emergency, the Three Powers will have to rely on cooperation by the German authorities. The problem of finding a proper legal basis for emergency measures by German authorities is primarily a German matter. The Three Powers have been concerned about the inactivity of the Germans in preparing emergency legislation. This has created uncertainty and has prevented adequate emergency planning. In this situation, the Three Powers have taken the initiative of offering to the Germans an interim solution, pending the enactment of appropriate German emergency legislation. The Germans claim that their new proposals are politically acceptable to them and are in conformity with their constitutional principles. We may agree or disagree with the German constitutional point of view. It will ultimately rest with the German Federal Constitutional Court to determine the constitutional question.

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In Articles 2 and 3 of their Proclamation, as proposed by the Germans, the three Ambassadors, in effect, state that measures for the protection of the security of the stationed forces will, in the first place, be taken by the German authorities and that the Ambassadors will make use of their powers only to the extent that the German authorities are prevented from taking effective action. This self-imposed restriction on the exercise of Allied rights is only acceptable if the Germans explicitly recognize that the measures proposed by them do not constitute the "legislation" referred to in paragraph 2 of Article 5 of the Convention on Relations. Such legislation would have the effect of extinguishing the rights reserved by the Three Powers which is not the case under the measures now proposed. We have been told that such legislation requires a constitutional amendment, but that the necessary two-thirds majority in both houses of the Federal legislature is for the time being not available.

The three Embassies have not as yet discussed the German proposals with Dr. Ritter. Representatives of the three Embassies had a meeting on August 10 to coordinate their preliminary views regarding these proposals. It was agreed that for the time being none of the Embassies would offer written comments prior to obtaining the views of their respective governments. On the other hand, it was agreed that the French representative, who was then next in line to see Dr. Ritter, would orally make a general statement on the German proposals along the lines of an agreed talking paper of which a copy is attached to this despatch. It was emphasized that these oral comments should in no way be considered as reflecting governmental views.

Before commenting in detail on the German proposals, it would seem necessary to have joint discussions with the German representatives with a view to further clarifying their proposals. The Embassy recommends that it be authorized: (1) to express to the Germans the U.S. Government's approval in principle of the new German approach to the question of an interim solution and (2) to enter into discussions with Dr. Ritter jointly with representatives of the other two Embassies.

For the Ambassador:

William R. Tyler
William R. Tyler
Counselor of Embassy

Enclosures: 2

1. Three draft instruments.
2. Talking Paper.

Coord:POL:DKlein *RL*

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DRAFT

PROCLAMATION

by The United States of America,
The United Kingdom of Great Britain and Northern Ireland and
The French Republic

WHEREAS

the events of the past few days, especially the attitude adopted by the Soviet Union and the authorities of the Soviet occupied zone of Germany, have resulted in gravely jeopardizing the existence of the Federal Republic of Germany and its free democratic basic order;

(and/or)

WHEREAS

the Federal Government has agreed that the circumstances require the exercise of the rights held by the Three Powers which relate to the protection of the security of armed forces stationed in the Federal Republic of Germany, which rights were temporarily retained in accordance with paragraph 2 of article 5 of the Convention on Relations between the Three Powers and the Federal Republic of Germany as amended by the Protocol signed at Paris on October 23rd, 1954, (hereinafter referred to as "Convention on Relations");

NOW therefore we,

Ambassador of the United States of America

Ambassador of the United Kingdom of Great Britain and Northern Ireland

Ambassador of the French Republic

having consulted the Federal Government,
acting on behalf of, and duly authorized by our governments,
do hereby jointly proclaim as follows:

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Article 1

The security of the forces stationed in the Federal Republic of Germany is directly endangered. The rights held by the Three Powers will be exercised in accordance with paragraph 2 of article 5 of the Convention on Relations.

Article 2

The Federal Government will take all measures necessary for the protection of the security of the forces stationed in the Federal Republic of Germany.

Article 3

The Three Powers will, in consultation with the Federal Government, use their rights mentioned in paragraph 2 of article 5 of the Convention on Relations only in so far as the German authorities are prevented from taking effective action to protect the security of those armed forces and to deal with a serious disturbance of public security and order.

Article 4

In their defence against the common danger the authorities of the Armed Forces and the German Authorities will cooperate in full accord and in fulfillment of their obligations under the North Atlantic Treaty.

Article 5

The present Proclamation shall take effect upon being made public.

Done at _____ on _____

(name) Ambassador of the United States of America

(name) Ambassador of the United Kingdom of Great Britain and Northern Ireland

(name) Ambassador of the French Republic

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DRAFT

PROCLAMATION OF THE PRESIDENT OF THE FEDERAL REPUBLIC
of 19 ..

These measures taken by the Government of the Soviet Union and the Government of the Soviet Zone of Germany constitute an imminent danger to the existence and the free democratic basic order of the Federal Republic of Germany as well as to the security of the armed forces stationed on its territory.

This constitutes an armed attack as defined in Articles 5 and 6 of the North Atlantic Treaty.

The United States of America, the United Kingdom of Great Britain and Northern Ireland, and the French Republic will not, in conformity with their proclamation of this day, exercise their rights reserved under Article 5 paragraph 2 of the Convention on Relations, insofar as the German authorities take the necessary measures for the protection of the security of the armed forces stationed in the Federal Republic and for the elimination of serious disturbances of public safety and order.

The Government of the Federal Republic of Germany must be capable of taking immediately all measures necessary for

warding off the imminent danger to the existence and free democratic basic order of the Federal Republic of Germany.

the protection of the security of the allied cause.

for the preservation of wild salmon.

for the fulfillment of the commitments of the Federal Republic of Germany under the North Atlantic Treaty.

Since the legislative bodies are prevented from taking legislative measures in due time and since there is danger in delay, I herewith declare, after consultation of the Speakers of the Bundestag and the Bundesrat, the

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STATE OF EMERGENCY
for the territory of the Federal Republic of Germany.

For the duration of this state of emergency the Federal Government is entitled to take all measures defined in my Decree of this day.

The state of emergency will continue until revoked by the Bundestag or the President of the Federal Republic.

.....the.....

The President of the Federal Republic

The Federal Chancellor

DRAFT

Decree by the President of the Federal Republic of Germany
of.....19..

(1) During the state of emergency the Federal Government is authorized

1. to issue ordinances having the force of law, also on matters which do not fall within the legislative jurisdiction of the Bund, to promulgate these decrees in deviating from Article 82 and to revocably delegate this authority to authorities of the Bund or of the Laender for special tasks;
2. by such ordinances
 - a) to limit the basic rights specified in Articles 5, 8, 11, and 12 to a degree otherwise not provided for,
 - b) in cases of expropriations, deviating from Article 14, Paragraph 3, Sentence 2, to leave type and extent of indemnification to a later settlement,

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- c) to deprive of effect Article 104, paragraph 2 through 4 in cases of deprivation of liberty provided a judicial examination is guaranteed;
- 3. to regulate the execution of Federal Laws and Ordinances having the force of law, the Federal Administration and Finance, in deviating from Sections VIII and X;
- 4. to employ besides the armed forces and the police forces of the Bund also the police forces of the Laender, if required.

(2) In case communications with the seat of the Federal Government are not only temporarily disrupted or in case the Federal Government is not in a position to take the necessary measures, the Ministers President of the Laender and, provided that the prerequisites are also given with regard to the relation of a Land to parts of its territory, the Regierungspräsidenten and, if absolutely necessary, the heads of the administration of the Landkreise and Landkreis-free towns are empowered to take temporary measures in their areas of responsibility in conformity with Paragraph (1) above. Temporary measures of such authorities will always be subject to annulation by the Federal Government or with regard to subordinate authorities also by the Ministerpräsidenten of the Laender.

....., the

The President of the Federal Republic

The Federal Chancellor

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TALKING PAPER

It is suggested that the three Embassies respond to the German proposal for an interim solution substantially along the following lines:

"We have looked at your proposal for the exercise of emergency powers pending enactment of suitable German legislation.

"Our original proposal for an interim solution -- as you will recall -- was for the three Ambassadors, in the exercise of their rights reserved under Article 5 (2), Convention on Relations, to proclaim a state of emergency, and to let the Federal Government, as agent of the three Ambassadors and under their authority, take the legislative and administrative measures appropriate to meet the emergency.

"The Allied proposal was based on two premises:

"1) that the Three Powers, while possessing all legal authority to act in an emergency, lacked the technical apparatus to make effective use of their rights and therefore were dependent on the cooperation of the Federal Government;

"2) that the Federal Government while possessing an effective machinery to act in an emergency, lacked the legal authority -- pending appropriate legislation -- to act in an emergency and therefore was dependent on the Three Powers to obtain the necessary authority from them.

"You have objected to the Allied proposal on political and constitutional grounds. Your political objection to the proposed interim solution was that it strongly suggested a return to Allied occupation and, in the eyes of the people, would seem to make a mockery of Germany's sovereign rights.

"We appreciate your objections. We are by no means committed to our proposal. Pending the enactment of appropriate German legislation, we are prepared to accept such other proposals for an interim solution as, in your view, would meet your political and constitutional requirements.

"You have told us that the proposal which you have submitted to us as a substitute for our draft Proclamation, namely, an Allied Proclamation and a Proclamation and a Decree by the Federal President, would meet these requirements. You have explained that under your proposal, the chief

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burden for taking the necessary measures rests with the German authorities and that the Three Powers will act only to the extent that German authorities are unable to take effective action. You have further explained that the German authorities derive their legal authority for their actions from the right inherent in a government to preserve its existence in an emergency.

"This inherent power, you have stated, manifests itself at the outbreak of an emergency when no one else is capable of acting effectively except the executive branch of the Government. We wish to point out that it is not equivalent with the powers - referred to in Article 5 (2) - which German authorities will obtain under German legislation. The inherent power to deal with an emergency can in no way limit, let alone abrogate, the rights reserved by the three Allies to protect the security of their forces. Nor will measures taken by German authorities in the exercise of this inherent power affect Allied rights under Article 5 (2)."

"You have told us that the basic constitutional concept from which your proposal is derived, namely, the existence of a power inherent in the Government to deal with an emergency situation is in conformity with German constitutional principles.

"Apart from these general observations, we can say nothing further at this time regarding your proposals. They surely will require further refinement in drafting. But we would like to see you proceed along the lines of this new approach. As you know, the absence of a constructive German counterproposal -- after our proposal had been rejected -- has disturbed us for quite some time. We therefore welcome this new initiative. We shall, of course, have to consult with our governments when your proposals have taken further shape."

August 3, 1959

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